



Signed: December 01, 2005

DO NOT PUBLISH

EDWARD D. JELLEN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re  
PATRICIA BERKOWITZ,  
Debtor. /

No. 05-40472  
Adv. No. 05-4227

NANCY FOSTER,  
Plaintiff,  
vs.

PATRICIA BERKOWITZ,  
Defendant. /

DECISION

By this adversary proceeding, plaintiff Nancy Foster ("Foster") seeks a judgment denying the discharge of Patricia Berkowitz, the above debtor ("Berkowitz"), pursuant to Bankruptcy Code § 727(a)(2)<sup>1</sup>

<sup>1</sup>Bankruptcy Code § 727(a)(2)(A) provides: The court shall  
(continued...)

Decision

1 (fraudulent prepetition transfer), (a)(3)<sup>2</sup> (concealment or  
2 destruction of recorded information), and (a)(4)<sup>3</sup> (false oath in  
3 bankruptcy case). The court will enter judgment in favor of  
4 Berkowitz.

5 Berkowitz is an attorney, and filed this chapter 7 bankruptcy  
6 case on February 3, 2005. Foster is a judgment creditor of  
7 Berkowitz, and holds a prepetition malpractice judgment against  
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9 <sup>1</sup>(...continued)  
10 grant the debtor a discharge, unless—

11 . . .  
12 (2) the debtor, with intent to hinder, delay, or  
13 defraud a creditor or an officer of the estate charged with  
14 custody of property under this title, has transferred, removed,  
15 destroyed, mutilated, or concealed, or has permitted to be,  
16 transferred, removed, destroyed, mutilated, or concealed—

17 (A) property of the debtor, within one year before the date  
18 of the filing of the petition.

19 <sup>2</sup>Bankruptcy Code § 727(a)(3): The court shall grant the  
20 debtor a discharge, unless—

21 . . .  
22 (3) the debtor has concealed, destroyed, mutilated,  
23 falsified, or failed to keep or preserve any recorded  
24 information, including books, documents, records, and papers,  
25 from which the debtor's financial condition or business  
26 transactions might be ascertained, unless such act or failure to  
act was justified under all of the circumstances of the case.

<sup>3</sup>Bankruptcy Code § 727(a)(4) provides: The court shall grant  
the debtor a discharge, unless—

. . .  
(4) the debtor knowingly and fraudulently, in or in  
connection with the case —(A) made a false oath or account.

1 Berkowitz in the sum of \$344,541. Foster contends that Berkowitz  
2 should not receive a discharge, alleging that: (1) Berkowitz  
3 fraudulently concealed her ownership of real property in Haiti by  
4 intentionally omitting same from her bankruptcy schedules,  
5 (2) Berkowitz fraudulently conveyed certain real property situated  
6 in Sea Ranch, California, (3) Berkowitz falsified her bankruptcy  
7 schedules by intentionally understating the value of her interest in  
8 a residence she owned, and (4) Berkowitz's prepetition conduct shows  
9 that she engaged in a fraudulent scheme to denude herself of her  
10 assets at Foster's expense.

11 A. Property in Haiti

12 Berkowitz's parents jointly owned two parcels of real property  
13 in Haiti on which are situated several houses (the "Haiti  
14 Properties"). Berkowitz's mother died in 1972. Berkowitz's father  
15 died intestate in 1998, leaving behind Berkowitz, Berkowitz's sister  
16 Irene Kellogg, and several children born out of wedlock.

17 Berkowitz did not list any interest in the Haiti Properties in  
18 her bankruptcy schedules, as originally filed; this omission is the  
19 centerpiece of Foster's allegation that Berkowitz fraudulently  
20 concealed an ownership interest in the Haiti Properties.

21 At the meeting of creditors held March 16, 2005, Paul Mansdorf,  
22 trustee in bankruptcy, asked Berkowitz whether she owned any  
23 property outside the United States. Berkowitz testified in response  
24 that she did not own the Haiti Properties, that they were still in  
25 the name of her parents, that she has no paperwork regarding them,  
26 and that she cannot sell them. She admitted that she had received

1 some rent money from the Haiti Properties, but had used these monies  
2 for upkeep.

3       Thereafter, on April 15, 2005, Berkowitz amended her Schedules  
4 to disclose as follows:

5       Debtor's mother and father died intestate in 1972 and  
6       1998, respectively, leaving two parcels of real property  
7       in Haiti. Debtor has resided in the United States since  
8       1965. She has seen no documents regarding ownership of  
9       either property. Debtor believes that one of the  
10      properties, located in Petionville, Haiti, was in the name  
11      of her father, Roger Aubry, and that the other property,  
12      located on Bourbon in Port-au-Prince, was in the name of  
13      her mother, Armande Aubry. Debtor has no idea of the  
14      value of the subject properties.

15      The weight of the evidence supports a finding that Berkowitz  
16      initial omission of the Haiti Properties from her schedules was not  
17      fraudulent.

18      At trial, Berkowitz waived her attorney-client privilege as to  
19      Martha Simon, Berkowitz's bankruptcy counsel who represented her in  
20      connection with the filing of her bankruptcy case and preparation of  
21      her bankruptcy schedules. Simon testified that before she prepared  
22      Berkowitz's bankruptcy schedules, Berkowitz had told her about the  
23      Haiti Properties. Simon further testified that she had advised  
24      Berkowitz that she need not include them in her schedules because  
25      the identity of the owner(s) under Haitian law was not clear,  
26      because Berkowitz had no paperwork or other evidence of title, and  
27      because Berkowitz lacked the ability as a practical matter to sell  
28      the Haiti Properties.<sup>4</sup>

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<sup>4</sup>Berkowitz testified that to the best of her knowledge,  
(continued...)

1 Good faith reliance on the advice of counsel negates the  
2 fraudulent intent required to deny a debtor's discharge. See In re  
3 Adeeb, 787 F.2d 1339, 1343 (9th Cir. 1986). Here, although  
4 Berkowitz would have been better advised had Simon told her to  
5 include a disclosure about the Haiti Properties in her schedules as  
6 initially filed, the court does not believe that Simon's advice, or  
7 Berkowitz's reliance on same, was not in good faith. Accordingly,  
8 the court holds that the omission was not fraudulent.

9 B. Sea Ranch Property

10 Paragraph 8 of Foster's complaint herein alleges that Berkowitz  
11 was "dealing with family members to remove property from defendant's  
12 name, without disclosing the full details of the transaction on the  
13 bankruptcy schedules." This vague allegation was apparently  
14 intended to refer to a prepetition transaction in which Berkowitz  
15 sold her undivided one-half interest in undeveloped real property in  
16 Sea Ranch, California for a purchase price of \$90,000, consisting of  
17 \$50,000 cash and a \$40,000 promissory note secured by a second deed  
18 of trust.

19 Foster contends that this sale was a fraudulent conveyance. In  
20 support of this allegation, Foster presented evidence showing that:  
21 (a) Berkowitz's son, Ashley Berkowitz, was executive director of the  
22 buyer, Epicarts Foundation, (b) Ashley received a gift of \$5,000 out  
23 of the cash portion of the sales proceeds, and (c) Epicarts was able

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24  
25 <sup>4</sup> (...continued)  
26 bankruptcy trustee Paul Mansdorf had not been able to sell, and  
had not attempted to sell the Haiti Properties.

1 to resell a fee interest in the property for \$239,000 some seven  
2 months after it acquired Berkowitz's one-half interest.

3 The evidence failed to establish that this transfer was a  
4 fraudulent conveyance. Berkowitz disclosed the sale (although not  
5 the \$5,000 gift) in her Statement of Financial Affairs. Berkowitz  
6 was able to effect the sale without payment of any broker's  
7 commission, and turned the \$40,000 purchase money note over to the  
8 trustee.

9 It is true that the sale was for a price less than 50% of the  
10 price for which Epicarts subsequently sold the entire property.  
11 However, the court does not believe the difference is significant to  
12 the extent of establishing fraud. The court has no evidence showing  
13 that Berkowitz could have sold her undivided 50% interest on the  
14 open market for a greater net amount. Moreover, Berkowitz  
15 testified, without contradiction, that before the sale, she had  
16 sought the advice of a professional broker, who advised her that the  
17 value of the fee was between \$155,000 and \$159,000.

18 The court holds that Berkowitz is entitled to prevail as to  
19 this claim for relief.<sup>5</sup>

20 C. Valuation of Personal Residence

21 Foster contends that, in her schedules, Berkowitz intentionally  
22 undervalued her residence. This allegation is based on the fact  
23 that Berkowitz scheduled the residence as having a value of \$620,000

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24  
25 <sup>5</sup>Given this finding, the court need not address the issue  
26 whether paragraph 8 of the complaint was sufficient to put the  
sale of the Sea Ranch property at issue.

1 whereas in a prepetition loan application for a refinance, Berkowitz  
2 listed the value as \$675,000, an amount approximately nine percent  
3 greater. Berkowitz testified that she based her valuation in the  
4 schedules on a market analysis she had obtained, and disclaimed  
5 knowledge of the valuation placed in the refinance application.

6 The court received no evidence of the actual value of the  
7 property as of the date of Berkowitz's bankruptcy petition, and the  
8 mere fact of the nine percent disparity between the two amounts does  
9 not ipso facto establish that Berkowitz's valuation in the schedules  
10 was fraudulent. See, generally, Cusano v. Klein, 264 F.3d 936, 946  
11 (9th Cir. 2001). Moreover, no evidence was presented showing that  
12 the trustee or anyone else was mislead in any way by Berkowitz's  
13 valuation. In re Adair, 253 B.R. 85, 89-90 (9th Cir. BAP 2000).

14 The court therefore holds that Berkowitz is entitled to prevail  
15 as to this claim for relief.

16 D. Scheme to Defraud Creditors

17 Foster contends that Berkowitz engaged in a scheme to defraud  
18 her by transferring her assets to third parties after Foster had  
19 commenced the malpractice litigation against Berkowitz. In support,  
20 Foster relies on the Sea Ranch sale mentioned above, and the fact  
21 that over the year that followed the filing of the malpractice  
22 complaint, Berkowitz repaid various debts she owed to the IRS, the  
23 California Franchise Tax Board, and individual persons other than  
24 Foster.

25 The court has already discussed the Sea Ranch sale. As to the  
26 other repayments, the court holds that no fraud is established by

1 the fact that Berkowitz repaid valid debts she owed to creditors  
2 other than Foster, but did not pay Foster.

3 One additional transaction that Foster cites as evidence of the  
4 alleged fraudulent scheme is a transfer of \$85,000 that Berkowitz  
5 made in March 2004, some four and one-half months after Foster filed  
6 her malpractice complaint. Berkowitz testified that she made this  
7 transfer to repay a series of loans made by a Haitian creditor named  
8 Pierre Charment, starting in 1997. Foster contends that because an  
9 action to collect all or some portion of any such loan would have  
10 been barred by the statute of limitations, the repayment was  
11 fraudulent.

12 The court disagrees. Neither the very limited facts regarding  
13 this transaction that the parties introduced into evidence, nor any  
14 law that Foster has cited, establish that the transaction was  
15 fraudulent.

16 E. Conclusion

17 For the foregoing reasons, the court will issue its judgment in  
18 favor of Berkowitz.

19  
20 \*\*END OF DECISION\*\*  
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COURT SERVICE LIST

Howard R. Melamed, Esq.  
319 Lennon Lane  
Walnut Creek, CA 94598

Martha J. Simon, Esq.  
155 Montgomery Street, Suite 1004  
San Francisco, CA 94104

Paul Mansdorf, Chapter 7 Trustee  
4071 San Pablo Dam Road, #433  
El Sobrante, CA 94803

Minnie Loo  
Office of the U.S. Trustee  
1301 Clay Street, #690N  
Oakland, CA 94612